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## State Courts Ponder Free Speech

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## COMMENT

### STATE COURTS PONDER FREE SPEECH

When society is in a flux, the easy answer to difficult questions can often be found in the statement that "times are changing." The recently expanded rights of labor can be explained by examining the change in personnel of the United States Supreme Court. A lawyer may fall back upon this approach to meet an old case which is directly opposed to the interests of his client. While the social and economic philosophy of judges attains its greatest importance in problems of constitutional law, and while the practicing attorney should, as a practical matter, notice

the former attitudes of each member of the Court upon constitutional problems, he would be ill-advised to argue that Case X should be overruled because the membership of that Court has changed. General constitutional language must of necessity be construed and influenced by the personalities of those called upon to determine its meaning, yet the attorney should be subtle and should proceed to build his argument upon legal principles. Thus the change in judicial attitude toward labor by the United States Supreme Court has in one very important field, picketing, been placed upon the constitutional guaranty of free speech.<sup>1</sup>

Just as one should consider, but not rely solely upon, a change in personnel of the Court, so should one appreciate the impact of World War II upon labor law, yet not hope to solve a particular case by saying: "Today, we are at war." Undoubtedly America's participation in the international conflict will and should affect the rights of both labor and management, but legal thinking should guide the approach to each phase of the problem. We still think in terms of complete victory for the United Nations, and at least the majority of the American people now intend to return to our constitutional, democratic, capitalistic system of government at the war's conclusion. Let us assume that we shall win the war, that we shall retain some form of capitalism and that our Constitution will stay on the books, and then try to determine the *present* relationship between labor controversies and free speech on the theory that, regardless of what happens in the next few years, basic constitutional principles will remain important, or will at least regain importance in the future.<sup>2</sup>

This article will deal particularly with the control exercised by the United States Supreme Court over various state policies toward picketing, and will examine the coupling of that labor activity with freedom of speech. The recent Supreme Court holdings on this subject may have ramifications throughout the field of labor law. Some of these impacts will be suggested, and reference will be made to legal writings discussing particular phases in detail. Washington cases will be examined in the light of federal judicial pronouncements, and the effect of the specific cases decided by the United States Supreme Court upon analogous fact patterns presented to the different state courts will be considered.

That different sanctions prevail in the laws of the various states is a necessary concomitant of the federal system. Congress can enact legislation which affirmatively unifies the law throughout the nation, but in one sense the Supreme Court acts only negatively,<sup>3</sup> that is, it can deter-

<sup>1</sup>American Federation of Labor v. Swing, 312 U. S. 321 (1941); Thornhill v. Alabama, 310 U. S. 88 (1940); Senn v. Tile Layers' Protective Union, 310 U. S. 468, 478 (1937). At least much of the language of the older cases has been swept away. Truax v. Corrigan, 257 U. S. 312 (1921) ("[I]t [picketing parade] was moral coercion by illegal annoyance and obstruction, and thus it was plainly a conspiracy."); American Steel Foundries v. Tri-City Trades Council, 257 U. S. 184 (1921) (only one picket can be placed at each entrance to the employer's plant, and they must not argue with those wishing to pass the picket line.).

<sup>2</sup>In the last two Washington labor cases (but before Pearl Harbor) Justice Millard has had considerable to say about the war. Weyerhaeuser Timber Co. v. Everett Lumber Workers, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941); S. & W. Fine Foods, Inc. v. Retail Drivers' and Salesmen's Union, 111 Wash. Dec. 168, 118 P. (2d) 962 (1941).

<sup>3</sup>Cf. Swift v. Tyson, 16 Pet. 1 (1842), where an attempt was made to give uniformity to the law by "persuading" the state courts to follow the "general law" to be declared in the federal courts, and the recognition of the failure of this attempt in *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

mine only those factual situations which are carried before that body. Legislation promulgates general doctrine; case law deals with specific application of the law. This "hit or miss" feature has injected much confusion into labor controversies. Many different factual situations contain a question as to relationship between picketing and freedom of speech, yet the Supreme Court has considered only a few of them. What about the others? Are they to be decided in the same way simply because they have some of the features of the decided cases? What can and cannot the state courts do in the field of injunctive relief? Do the picketing cases govern secondary boycotts or the right to call a strike? These are some of the problems confronting one who tries to analyze a particular labor controversy today.

Just one more thought by way of introduction. A recent Washington case exemplifies the dilemma that state courts experience in handling a labor controversy which involves a federal constitutional problem.<sup>4</sup> The case provoked *six separate* opinions, three members of the court being the most that could be mustered to subscribe to any one line of approach. Many states are finding that their policy toward the rights of pickets must be modified, and others are trying to determine if the Supreme Court's pronouncements on picketing extend into other aspects of labor activities. Can state courts do anything but bring confusion out of chaos? This article may not answer that question, but it will certainly show why the question can be asked.

#### THE CONSTITUTIONAL HISTORY OF PICKETING

A few years ago the legality of picketing was largely a matter of state policy, enunciated most frequently through the courts in injunction cases rather than through the legislatures. If the picketing was peaceful and no actual intimidation was involved, most courts found it lawful.<sup>5</sup> The view of a substantial number of courts on the other side of the fence is colorfully set out in *Atchison, T. & S. F. Ry. Co. v. Gee*<sup>6</sup> where the court declared that there "can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." While this minority doctrine cannot be sustained today,<sup>7</sup> it reflects a general feeling still prevalent that the propriety of picketing is not beyond question. Really, the law of peaceful picketing is largely a problem of social justification for harm done. The interest of the picketing union in attaining an objective, the interest of the one injured, and the general interest of society are thrown upon the scales, and then the judge puts his hand upon the side that appeals to his personal philosophy.<sup>8</sup> Picketing hurts the employer; that is the reason he is picketed as part of a program to force him to accede to union demands. It is an intentional injury to property which must be justified. Many cases appear to see the injury and to hold for the employer

<sup>4</sup>*Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941).

<sup>5</sup>See Sayre, *Labor and the Courts* (1930) 34 YALE L. J. 682, 701, note 72 (case authority).

<sup>6</sup>139 Fed. 582 (C.C.S.D. Iowa, 1905). See cases cited *infra* note 59.

<sup>7</sup>See discussion and cases, *infra*, page 169. But see *Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 386, 119 P. (2d) 643, 647 (1941), Steinert, J. (dissenting): "Indeed, the term 'peaceful picketing', though in itself a *mixed metaphor* . . ." (Italics supplied).

<sup>8</sup>TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* (1940) §§ 73, 190 *et seq.*

immediately without considering the question of justifiable cause.<sup>9</sup>

*Duplex Printing Co. v. Deering*<sup>10</sup> laid the foundation for employer protection by the Constitution. A secondary boycott<sup>11</sup> was held illegal. Then came *Truax v. Corrigan*<sup>12</sup> and the Court cited the *Duplex* case for the proposition that an employer's business is a property right, and went on to hold that such a right cannot "arbitrarily or capriciously" be left unprotected by a rigid state anti-injunction act. The normal rule is that one has no vested right in common law practices (an injunction against picketing).<sup>13</sup> The Court nevertheless said that if a state permits wrongful and highly injurious invasions of property rights through improper picketing, that state violates the due process and equal protection clauses of the fourteenth amendment.<sup>14</sup>

Peaceful picketing has never been regarded as a misnomer by the Supreme Court, nor likened to "chaste vulgarity." Shortly before the *Truax* case, Mr. Chief Justice Taft had broadly declared in the famous *Tri-City* case<sup>15</sup> that labor unions had the unquestioned right of peaceful persuasion. Perhaps this was just lip service, since the opinion proceeded to justify only the presence of one picket at each entrance to the plant, but the holding at least purported to try to balance the interests of labor and capital. The subsequent *Truax* opinion showed that this right of "peaceful persuasion" was strictly limited.

During the last decade, state legislatures have attempted to limit the power of courts to issue injunctions in labor disputes through the anti-injunction acts,<sup>16</sup> but many courts have met these challenges by strained, even distorted, constructions.<sup>17</sup> Congress passed the Norris-LaGuardia Act in 1932, thereby restraining injunctions in labor disputes involving interstate commerce or coming before the federal courts.<sup>18</sup> Federal protection of employees in intrastate labor contro-

<sup>9</sup>A good collection of cases can be found in Sayre, *supra* note 5, at 702, note 73.

<sup>10</sup>254 U. S. 443 (1921).

<sup>11</sup>"... to exercise coercive pressure on customers, actual or prospective, in order to cause them to withhold or withdraw their patronage, through fear of loss or damage to themselves," *id.* at 446; See Barnard and Graham, *Labor and the Secondary Boycott*, (1940) 15 WASH. L. REV. 137 (1940).

<sup>12</sup>257 U. S. 312 (1921)

<sup>13</sup>N. Y. Central Co. v. White, 243 U. S. 188 (1916).

<sup>14</sup>Other forms of property invasions, such as nuisances, were enjoined in the state court; therefore, plaintiff-employer was denied equal protection.

<sup>15</sup>*American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921)—"Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malice." See also, Sayre, *supra* note 5, at 703.

<sup>16</sup>RESTATEMENT, TORTS (1939) § 813. See also note 62, *infra*.

<sup>17</sup>New York, a jurisdiction historically liberal toward labor, reversed its attitude after the passage of an anti-injunction act; that court now refuses to find a "labor dispute," thus limiting the scope of the statute, unless the objective of the union bears some direct relation to wages, hours, or conditions of employment. *People v. Muller*, 286 N. Y. 281, 36 N. E. (2d) 206 (1941); *American Guild v. Petrillo*, 286 N. Y. 226, 36 N. E. (2d) 123 (1941); *Opera on Tour, Inc. v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941). The Washington court has tampered with its anti-injunction act until it is impossible to determine its status today. Jaffe, *Status of Picketing in Washington* (1940) 15 WASH. L. REV. 47.

<sup>18</sup>47 Stat. 70 (1932), 29 U. S. C. A. § 101 *et seq.* (Supp. 1941). Cf. the Clayton Act, 38 Stat. 738 (1914), 29 U. S. C. A. § 52 (1927).

versies, however, was not suggested until later.

The injury to an employer's business by adverse labor activity has already been noted, and the Supreme Court gave the employer a constitutional weapon in the form of the fourteenth amendment.<sup>19</sup> Capital could place two weights on its side of the scales—a tortious injury and a constitutional guaranty of property rights. Labor, however, could display but one—the right to improve its status in the economic structure.<sup>20</sup> In 1937 the Supreme Court discovered the constitutional argument which could be added to labor's side of the scales. *Senn v. Tile Layers Protective Union*<sup>21</sup> involved pickets demonstrating peacefully, and the dispute in court was about the purpose of the picketing. The employer bemoaned the lower court's refusal to protect him against picketing unaccompanied by a strike, but the Supreme Court held that the fourteenth amendment did not guarantee his right of injunction against peaceful picketing. This significant dictum followed:

"Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the federal Constitution."<sup>22</sup>

The shuffle preceding the new deal for labor was started.

The dictum of the *Senn* case was not forgotten, and within three years the Court had a clear cut opportunity to place freedom of speech in the Digests under "Labor". In *Thornhill v. Alabama*<sup>23</sup> a state statute making it a crime to picket peacefully was held unconstitutional because of employees' constitutional right of free speech under the due process clause of the fourteenth amendment. A similar county ordinance received the same treatment in the next breath of the court.<sup>24</sup>

The scope of the *Thornhill* decision was, of course, ambiguous. Its language intimated that freedom of speech was an overriding constitutional dogma which might justify labor activity formerly frowned upon by the most liberal of courts.<sup>25</sup> The facts, however, were confined to peaceful picketing of an employer's place of business by employee dis-putants.

Force, violence and riots were soon excluded from the constitutional protection, and new groundwork for the power of states to control picketing, at least partially, was laid. *Milk Wagon Drivers' Union v. Meadowmoor Dairy*.<sup>26</sup> affirmed an Illinois injunction which prohibited all picketing because the "picketing in this case was set in a background of violence."<sup>27</sup> The Supreme Court recognized that the police power of the state may outweigh the constitutional right of self-expression. One

<sup>19</sup>See discussion, *supra* page 158.

<sup>20</sup>Many judges doubted if this was of any weight at all. See discussion, *supra* page 157. Perhaps this explains the reluctance of Chief Justice Taft to permit more than one picket at each entrance to the plant in the *Tri-City* case, *supra* note 15.

<sup>21</sup>301 U. S. 468 (1937).

<sup>22</sup>*Id.* at 478.

<sup>23</sup>310 U. S. 88 (1940).

<sup>24</sup>*Carlson v. California*, 310 U. S. 106 (1940).

<sup>25</sup>For example, picketing of remote parties in secondary boycott cases. See Barnard and Graham, *supra* note 11; discussion, *infra* page 170, *et seq.*

<sup>26</sup>312 U. S. 287 (1941).

<sup>27</sup>*Id.* at 294.

may speak strongly, but if he accompanies his language with a right to the jaw, he may lose his right to speak at all. Labor found that free speech has at least one limitation.

Capital's headache following the *Thornhill* case was relieved but very temporarily by the aspirin of the *Meadowmoor* decision, for on the same day the Court sent employers scurrying for more and bigger ice packs. Wishful thinking was torn asunder by a new decision which refused to limit the *Thornhill* case to its immediate facts. *American Federation of Labor v. Swing*<sup>28</sup> held that the constitutional guaranty of freedom of discussion was infringed by the common law policy of a state which forbade peaceful picketing when there was no immediate employer-employee dispute. A beauty shop union picketed an establishment where none of the employees were union members, and the injunction granted by the state court was set aside by the High Tribunal. The *Meadowmoor* limitation on free speech was characterized as exceptional, for the Court said in reference to that holding:

"... we held that acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation."<sup>29</sup>

The opinion also threw a scare that so-called secondary or remote picketing might be protected when peaceful—"the interdependence of economic interest of all engaged in the same industry has become commonplace."<sup>30</sup> Capital had to wait until the next year for a decision which began the job of drawing the line beyond which the speech of pickets is not "free".<sup>31</sup>

At this point in our consideration of the Supreme Court's pronouncements in labor controversies, it seems advisable to pause for a moment and to consider the wisdom of identifying picketing with freedom of speech. An eminent authority, Mr. Ludwig Teller, has entitled a section of his treatise on labor law, "Unwisdom of the Identification".<sup>32</sup> The gist of his criticism is to be found in these excerpts:

"Shall the right to picket claim its source in the idea of free speech or shall it rather be obliged, as a prima facie tort, to justify its exercise? Because picketing involves not only the exercise of free speech but something more, it is contended here that the latter frame of reference is the preferable one. . . . The marching to and fro before the premises of the person picketed, banner in hand of the marcher, involves the practice of picketing in a distinction which invokes the category of tort".<sup>33</sup>

The author then calls attention to the ramifications of a constitutional guaranty of all peaceful picketing, and considers the "hard cases", such as picketing of remote parties, picketing for closed shops, or

<sup>28</sup>312 U. S. 321 (1941).

<sup>29</sup>*Id.* at 323.

<sup>30</sup>*Id.* at 326.

<sup>31</sup>The possibility of a restraint other than violence upon freedom of speech had been foreshadowed in the *Thornhill* case, *supra* note 23, at 105. "The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted." The "next year" decision is *Carpenters' and Joiners' Union v. Ritter's Cafe*, 62 Sup. Ct. 807 (1942), *infra* page 162.

<sup>32</sup>TELLER, *supra* note 8, § 136.

<sup>33</sup>*Ibid.*

picketing in violation of a collective bargaining agreement. Freedom of speech is not to be restrained at place X simply because the same thought can be expressed at place Y,<sup>34</sup> and Mr. Teller anticipated that, if consistent, the Court would be reluctant to permit state injunctions although the "picketing bids fair to become a social menace instead of a desirable aid to the achievement of new rights. . . . Beyond the sphere of the labor controversy, it is submitted that the practice of picketing ought not to extend."<sup>35</sup> The Court has recently had a few things to say about these ramifications, and a consideration of them will constitute a good portion of this article. At least a wavy line has been drawn about freedom of speech, and the dissenters in the case cried "inconsistent".<sup>36</sup> Perhaps the criticism discussed above is justified.

Another consideration, however, was overlooked by Mr. Teller. Earlier in this article, the constitutional protection of capital was mentioned, and it was noted that labor had nothing to argue on its side except the right to improve its station in life.<sup>37</sup> To approach picketing as a tort, constitutionally redressable, which must then be justified, is all right analytically; but when in practice many state courts<sup>38</sup> and state legislatures<sup>39</sup> can see no justification, a more dogmatic basis upon which labor can stand is needed. Perhaps freedom of speech gives too much rope to labor interests, but if we remember that too much rope may hang a man, the likelihood is great that courts will work out a balancing of interests which is more just than that which existed before labor was given its constitutional prop. Whether labor must "justify its tort" or use its freedom of speech "reasonably" may be but two ways of expressing the same idea. The latter language, however, reverses the emphasis, and gives to the former underdog an opportunity to receive better treatment in the courts. By interspersing a constitutional issue into labor injunction cases, the Supreme Court has placed itself in a position to police prejudiced state rulings, regardless of which way the prejudice runs.<sup>40</sup>

*Bakery and Pastry Drivers v. Wohl*<sup>41</sup> extended the scope of the *Swing* case<sup>42</sup> in two directions. The Court ruled that a union cannot be

<sup>34</sup>*Schneider v. State*, 308 U. S. 147, 163 (1939).

<sup>35</sup>TELLER, *supra* note 8, § 136. Accord: *Carpenters' and Joiners' Union v. Ritter's Cafe*, 62 Sup. Ct. 807 (1942).

<sup>36</sup>See discussion of *Carpenters' and Joiners' Union v. Ritter's Cafe*, 62 Sup. Ct. 807 (1942), *infra* page 163.

<sup>37</sup>See discussion, *supra* page 159.

<sup>38</sup>Washington, for example: *Danz v. American Federation of Musicians*, 133 Wash. 186, 233 Pac. 630 (1925) and earlier cases cited therein.

<sup>39</sup>Alabama statute, for example, in *Thornhill v. Alabama*, *supra* note 23.

<sup>40</sup>*Truax v. Corrigan*, *supra* note 12, policed a denial to the employer of his common law remedy. Labor, now, has the decisions springing from the *Senn* dictum, *supra* notes 21, 22, which can be called upon to retard anti-labor judges. See discussion of the Washington court's anxious eye toward the Supreme Court of the United States when it considers labor controversies, *infra* page *et. seq.*

Labor leaders are open to censure for many of their practices, but it must be remembered that capital held the whip-hand ungraciously for a long time. Labor's attitude of retaliation and retribution for past wrongs is the damning factor in all labor controversies that prompts one to condemn their cause *in toto*.

<sup>41</sup>62 Sup. Ct. 816 (1942).

<sup>42</sup>*Supra* note 28.



enjoined from picketing retail establishments that purchase bakery products from a "peddler" who employs no help. Although there was no "labor dispute" in the *Swing* case, because the employees were unattached to the picketing union, the plaintiff there was an employer of labor. The *Wohl* opinion, however, gave constitutional sanction to picketing prompted because a man did all his own work.<sup>43</sup>

The other extension of the right to picket found in the *Wohl* case arose because the picketing was secondary. Wohl's customers were the ones picketed, and the Court held that, at the least, a product can be traced by constitutionally protected pickets.<sup>44</sup>

"A state is not required to tolerate in all places and all circumstances even peaceful picketing of an individual. But so far as we can tell, respondent's mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue."<sup>45</sup>

Employers who read the *Wohl* case before noticing the decision in *Carpenters and Joiners Union v. Ritter's Cafe*,<sup>46</sup> handed down the same day, undoubtedly shuddered and thought that the fondest dreams of labor had come true—that practically any peaceful picketing would be protected by the Federal Constitution—despite the broad statement in the first sentence of the above quoted portion of the opinion.<sup>47</sup>

While rules turning upon degree create uncertainty in the law, unrestrained peaceful picketing is socially undesirable. Mr. Teller's criticism<sup>48</sup> would be soundly justified if the Supreme Court did not at some time limit the impact of the fourteenth amendment upon labor

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<sup>43</sup>The union wanted Wohl to join and to work only six days a week, or in the alternative, to hire a union helper for the seventh day. Since Wohl made about \$35.00 a week working seven days, he refused. Besides the union's purpose of more dues, the defendant also wanted to protect union peddlers from being undersold by a "scab" distributional system.

<sup>44</sup>*Id.* at 819. See also *Carpenters' and Joiners' Union v. Ritter's Cafe*, 62 Sup. Ct. 807, 810 (1942) where this is said about the *Wohl* case: "In picketing the retail establishments the union members would only be following the subject matter of their dispute."

<sup>45</sup>*Ibid.* Justice Douglas, concurring, dislikes the reference to the lack of monetary injury resulting from the picketing. He says: "If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from *Thornhill v. Alabama* . . ." *Id.* at 819. The majority opinion does not strike the present writer as so implying. Rather the language intimates that the Court is testing the justification for the state injunction, and trying to balance all the elements. Certainly the degree of injury resulting from the injury compared to the futility or impropriety of the picketing should be of importance. It is of importance unless one is carried away by the dogmatic idea that all picketing must necessarily be tolerated because of the fourteenth amendment—an assumption that fails to recognize other elements involved in picketing besides free speech.

<sup>46</sup>62 Sup. Ct. 807 (1942).

<sup>47</sup>Only the first sentence of the quoted portion from the *Wohl* case, above, points the other way. Undoubtedly Justice Jackson had the *Ritter* case in mind.

<sup>48</sup>*Supra* page 160.

controversies. This limitation appears in the now three months' old *Ritter* case.<sup>49</sup> Whether the suit in which the Court chose to enunciate the doctrine that each case must be determined upon its own facts<sup>50</sup> required a break from the flat rule that free speech justifies all picketing, may be subject to argument. At least four members of the Court thought the injunction should be set aside. From a reading of the two dissenting opinions, however, one suspects that at least three of these Justices quarrel not only with the application of the limitation to the *Ritter* case, but also with the proper existence of any limitation at all upon peaceful picketing. The latter dogma is too arbitrary. Although capital had a great advantage at one time in labor disputes, the courts should not think in terms of retribution, as do some labor union leaders, but in principles of equality. Two wrongs do not make a right. The scales should not favor labor simply because they improperly favored capital before the error was discovered.

Ritter hired a contractor to erect a building for him about a mile and a half from his restaurant. All the employees of the cafe were union men, but the contractor used non-union help. Pickets from the Carpenter's Union placed at the restaurant caused a strike and dissuaded union suppliers from passing the picket line. Ritter's Cafe suffered a 60% decrease in business. An injunction against the picketing was affirmed by the United States Supreme Court in a five to four decision. Mr. Justice Frankfurter, speaking for the majority, summarized the holding in these words:

"But recognition of peaceful picketing as an exercise of free speech does not imply that states must be without power to confine the *sphere of communication to that directly related to the dispute*. . . . It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the fourteenth amendment does not deny her the power to enact that policy into law."<sup>51</sup>

At least one dissenter, Mr. Justice Reed, does not "doubt the right of the state to impose not only some but many restrictions upon peaceful picketing."<sup>52</sup> But he quarrels with the majority because free speech is confined to the "area of the industry within which a labor dispute arises"—not one of the "many restrictions" justifiable under his reading of the fourteenth amendment. Justice Reed recognizes the propriety of some limitations upon the scope of free speech, but feels that the *Ritter* case does not call for one of those restrictions.

A reading of the other dissenting opinion, that of Justices Black, Douglas, and Murphy, written by the first, is not so comforting. When Justice Black declares:

<sup>49</sup> *Supra* note 46.

<sup>50</sup> ". . . the boundary at which conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side . . ." *Id.* at 809, *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355 (1908), is the source of this language used by the Court.

<sup>51</sup> *Id.*, at 810. Italics supplied.

<sup>52</sup> *Id.*, at 815. His examples of proper restrictions might be classified as "breaches of the peace." (" . . . reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations not destructive of the right to tell of labor difficulties . . .").

"I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right",<sup>53</sup>

and concludes:

"Accepting the constitutional prohibition against any law 'abridging the freedom of speech or of the press'—a prohibition made applicable to the states by the Fourteenth Amendment—as a command of the broadest scope that explicit language, read in the context of liberty-loving society, will allow . . . I think the judgment should be reversed."<sup>54</sup>

one suspects that this Justice feels that peaceful picketing of any place or any person is protected by the Constitution. If such were the law, then surely Mr. Teller's prophecy of "social menace" from picketing would be fulfilled.<sup>55</sup>

Granting that the majority is correct in holding that some limitations should be placed upon the right of free speech in labor disputes, let us examine the extent of these limitations, and try to determine their significance in other fact patterns. While the *Ritter* decision holds that a balancing of interests should be undertaken in labor controversies,<sup>56</sup> it gives little indication as to how the elements are to be placed upon the scales. Texas can prohibit picketing outside the "economic context of the real dispute",<sup>57</sup> and "neutrals having no relation to either the dispute or the industry in which it arose" are protected.<sup>58</sup> Beyond these specific statements we have only the general tenor of the opinion for a guide. The remainder of this article will concern itself with the problems confronting state courts when they adjudicate labor controversies left dangling outside the sphere of the cases decided by the Supreme Court.

#### THE WASHINGTON SUPREME COURT FACES THE CONSTITUTION

The history of labor rights in the state of Washington is turbulent. From an early holding that all picketing is illegal *per se*,<sup>59</sup> a recent case has followed the *Swing* case to the extreme by denying an injunc-

<sup>53</sup> *Id.*, at 811.

<sup>54</sup> *Id.*, at 812.

<sup>55</sup> See discussion, *supra* page 161.

<sup>56</sup> "The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both . . . [The states are not] powerless to confine the use of this industrial weapon [picketing] within reasonable bounds . . . The question always is whether the state has violated the *essential attributes* of that liberty . . ." *Id.*, at 808. (Italics supplied).

<sup>57</sup> *Id.*, at 809.

<sup>58</sup> *Id.*, at 810. The *Wohl* case is distinguished because the same business interest, baked goods, was held both by the plaintiff-disputant and the picketed retailers.

<sup>59</sup> *Danz v. American Federation of Musicians*, 133 Wash. 186, 233 Pac. 630 (1925); *Baasch v. Cooks' Union Local*, 99 Wash. 378, 169 Pac. 843 (1918); *St. Germain v. Bakery and Confectionery Workers Union*, 97 Wash. 282, 166 Pac. 665 (1917); *Jensen v. Cooks' and Waiters' Union*, 39 Wash. 531, 81 Pac. 1069 (1905).

tion against picketing for an unlawful purpose.<sup>60</sup> The impact of United States Supreme Court holdings has been noted in practically all the recent cases, and peaceful picketing is now clearly recognized as lawful.<sup>61</sup>

Not only has the legality of picketing itself had a hectic career, but also the effectiveness of anti-injunction legislation has had its ups and downs in Washington. At one time the Washington Court held our counterpart of the Norris-La Guardia Act to be unconstitutional, on the theory that the statute took away an historical tool of equity, the injunction, in violation of the doctrine of separate powers.<sup>62</sup> The amazing history of how the court continued to treat the anti-injunction act as though it were still on the books has received excellent treatment in the *WASHINGTON LAW REVIEW*.<sup>63</sup> While the Washington Court recognized the statute, it nevertheless proceeded to emasculate its plain language by granting injunctions unless the "labor dispute" was between an employer and his employees—this in the teeth of express declaration in the act that it was to apply "regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>64</sup>

Then freedom of speech was encountered by the Washington Court in a case where, under the prior decisions, injunctive relief was customary. In *O'Neil v. Building Service Employees' International Union*<sup>65</sup> the plaintiff operated two apartment houses with the assistance of her family and without the help of outside employees. Defendant union peacefully picketed the apartment houses in an effort to compel the plaintiff to join the union. The employer-employee relation did not exist between the disputants, but the Washington Court denied injunctive relief, saying that the right of peaceful picketing was guaranteed by the constitutional right of free speech as defined by the United States Supreme Court.

Was the Washington Court correct in thus interpreting the commands of the Supreme Court? The *Wohl*<sup>66</sup> case was in its lower court infancy when the *O'Neil* decision came down, but the subsequent holding of the Supreme Court denying an injunction to Mr. Wohl indicated that the Washington Court correctly guessed the attitude of the High Tribunal. Both Mr. Wohl and Mrs. O'Neil encountered pickets who objected to "capitalists" working without joining the union. The cases are on all

<sup>60</sup> *Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941). See discussion, *infra* page 166.

<sup>61</sup> *O'Neil v. Bldg. Service Employees International Union*, 9 Wn. (2d) 507, 115 P. (2d) 662 (1941); *Edwards v. Teamsters Local Union*, 8 Wn. (2d) 492, 113 P. (2d) 28 (1941); *Sears v. International Brotherhood of Teamsters*, 8 Wn. (2d) 447, 112 P. (2d) 850 (1941). Cf. *Zaat v. Bldg. Trades Council*, 172 Wash. 445, 20 P. (2d) 589 (1933).

<sup>62</sup> *Blanchard v. Golden Age Brewery*, 188 Wash. 396, 63 P. (2d) 397 (1936).

<sup>63</sup> Jaffe, *supra* note 17.

<sup>64</sup> Wash. Laws Ex. Sess. 1933, c. 7, § 13, REM. REV. STAT. § 7612-13 (Supp. 1939). See *Shively v. Garage Employees' Local Union*, 6 Wn. (2d) 560, 108 P. (2d) 354 (1940); *United Union Brewing Co. v. Beck*, 200 Wash. 474, 95 P. (2d) 772 (1939); *Fornili v. Auto Mechanics' Union*, 200 Wash. 283, 93 P. (2d) 422 (1939); *Adams v. Building Service Employees' Union*, 197 Wash. 242, 84 P. (2d) 1021 (1938); *Safeway Stores v. Retail Clerks' Union*, 184 Wash. 322, 51 P. (2d) 372 (1935). Cf. *Yakima v. Gorham*, 200 Wash. 564, 94 P. (2d) 180 (1939).

<sup>65</sup> 9 Wn. (2d) 507, 115 P. (2d) 662 (1941). See also cases cited, *supra* note 61.

<sup>66</sup> *Supra* note 41.

fours except that the picketing complained against by Wohl was secondary—an additional element which made the *Wohl* case a harder one. Washington's toes would have been stepped on by the United States Supreme Court if our court had enjoined the picketing of Mrs. O'Neil's apartment houses.

The next encounter in Washington between free speech and the injunction was late in 1941. *S. & W. Fine Foods Inc. v. Retail Drivers' and Salesmen's Union*<sup>67</sup> involved picketing by the defendant union of the S. & W. plant because their salesmen, who were perfectly satisfied with the *status quo*, had refused to join the union. The *Swing* case was directly in point, and the Washington court faced and accepted the national fiat.<sup>68</sup>

*Weyerhaeuser Timber Co. v. Everett Lumber Workers*,<sup>69</sup> decided in December, 1941, was mentioned early in this paper.<sup>70</sup> Nine judges required six opinions to express their views concerning the following factual set-up. The defendant union was in the minority, and sought to induce the employer-plaintiff to enter an employment contract with it, although to do so would be in violation of the Wagner Act since the employer was already under contract with the majority bargaining unit. The election had not yet been certified by the National Labor Relations Board, but certification is not necessary before the employer can violate the Wagner Act by dealing with minorities. The resulting picketing was not strictly peaceful, for some threats were made which deterred entrance to the mill. The union was satisfied when the trial court issued an injunction against the use of *more* than five pickets at the main entrance to the plant, but Weyerhaeuser appealed on the ground that *all* picketing should have been enjoined. Six justices voted for affirmation; three for reversal and the granting of the complete injunction.

The "majority" opinion, which expressed the views of three men, found no violence, and followed a line of federal lower court decisions which had upheld picketing by a minority union after election, but prior to certification by the N. L. R. B.<sup>71</sup>

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<sup>67</sup> 111 Wash. Dec. 168, 118 P. (2d) 962 (1941).

<sup>68</sup> The case was much easier than the *O'Neil* decision, and seemed foreclosed by the express declaration of the *Swing* case, yet the employer had the courage to fight an appeal to the Washington Supreme Court, and found one justice who silently protested against the *Swing* rule. (Justice Steinert dissented without opinion.)

Chief Justice Robinson concurred in the result but only under the compulsion of the *Swing* doctrine. He feels that the Supreme Court has given unqualified sanction to peaceful picketing (cf. the subsequent *Ritter* case, *supra* page 162, and bemoans this extension of the right of free speech. "It [United States Supreme Court] formerly held—and until very recently—that the right of freedom of speech 'is not absolute,' but 'is subject to restriction and limitation' . . . *Gilbert v. Minnesota*, 254 U. S. 352 [1920] . . ." He is probably happy about the wavy line drawn about picketing in the *Ritter* case, but undoubtedly still feels that the noose should be pulled tighter.

<sup>69</sup> 111 Wash. Dec. 377, 119 P. (2d) 643 (1941).

<sup>70</sup> See discussion, *supra* page 157.

<sup>71</sup> *Lund v. Woodworkers*, 19 F. Supp. 697 (D. C. Minn., 1937); *Blankenship v. Kurfman*, 96 F. (2d) 45 (C. C. A. 7th, 1938); *Cupples Co. v. American Federation of Labor*, 20 F. Supp. 894 (D. C. Mo., 1937); *Sharp and Dohme v. Storage Warehouse Employees Union*, 24 F. Supp. 701 (D. C. Penn., 1938); *Fur Workers Union Local 72 v. Fur Workers Union*, 105 F. (2d) 1 (App. D. C., 1939). Cf. *Bloedel Donovan Lbr. Mills v. International*

Chief Justice Robinson reluctantly concurred because of the Supreme Court's declarations in the *Swing* case. Interestingly enough, considering his aversion to the free speech rule, the Chief Justice felt forced to add that:

"... there is much reason to think that, should the matter come before it, the Supreme Court would dissolve even the comparatively mild injunction which the trial court's order left in effect. It expressly forbids picketing by more than five pickets. . . . Under the doctrine of the *Swing* and companion cases, would not the Court be compelled to hold that the injunction limiting the picket line to five men deprived each of the several hundred others of their respective constitutional rights of freedom of speech?"<sup>72</sup>

He added that it should be immaterial whether certification had taken place. If the Wagner Act is interpreted to deny the right to picket after certification, is not the unqualified right<sup>73</sup> of free speech unconstitutionally infringed by Congress?<sup>74</sup> This interpretation of the *Swing* case by a man who does not agree with the basis of that decision confirms the shudders experienced by capital when that opinion first came down. State courts must remold their labor policy in conformity to the national pattern, but they are experiencing great difficulty in determining the dimensions of that mold.

An examination of three dissenting opinions<sup>75</sup> finds them in accord on the proposition that the threats made to persons wanting to pass the picket line added violence to the conflict which would justify a complete injunction under the doctrine of the *Meadowmoore* case.<sup>76</sup> The lack of bloodshed, however, takes the *Weyerhaeuser* case outside the field of violence, although, as Justice Simpson indicated, injuries were avoided because the threats were taken seriously.<sup>77</sup> The mild injunction granted by the trial court would probably forestall future violence, and although the injunction in the *Meadowmoor* case was complete, the Court there Woodworkers, 4 Wn. (2d) 62, 102 P. (2d) 270 (picketing after certification, enjoined). The "majority" in the instant case approved this earlier Washington case, and said the granting or refusal of an injunction should turn upon the state of certification proceedings. *Accord: Oberman and Co. v. United Garment Workers, 21 F. Supp. 20* (1937). *Contra: Florsheim Shoe Store Inc. v. Retail Salesman's Union, 27 N. Y. S. (2d) 883* (1941) ("labor dispute" found still to exist regardless of certification, and anti-injunction act prohibited relief. Free speech not mentioned).

Observe that *Weyerhaeuser* argued no "labor dispute," relying upon the cases cited note 64, *supra*. Justice Blake, however, instead of saying that free speech makes the cases under the anti-injunction act immaterial, talked as though these cases were still good law, but distinguishable because here the minority employees *did* work for the plaintiff! *Id.*, at 380.

<sup>72</sup> *Id.*, at 405.

<sup>73</sup> The Chief Justice did not anticipate any limitation upon peaceful picketing. This opinion was written before the very recent *Ritter* case, *supra* note 46, came down.

<sup>74</sup> The first amendment to the Federal Constitution expressly says that "Congress shall make no law . . . abridging the freedom of speech." Cf. *United States v. Building and Construction Trades Council of New Orleans, 61 Sup. Ct. 839* (1941) where the Court, upon the authority of *United States v. Hutcheson, 312 U. S. 219* (1941), refused to set aside a demurrer to an action against a union for boycotting after certification.

<sup>75</sup> Justices Steinert, Beals and Simpson.

<sup>76</sup> *Supra* page 159.

<sup>77</sup> *Id.*, at 407.

expressly added:

"The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation."<sup>78</sup>

The best ground of dissent, particularly in light of the subsequent *Ritter* case,<sup>79</sup> was founded on the idea that free speech is not an unqualified right, and that since the *end* sought by the pickets was improper (Weyerhaeuser would break the law if it dealt with a minority union), the picketing was enjoinable. Only Justice Steinert presented this argument. Why should freedom of speech turn on *certification*?<sup>80</sup> If picketing outside the economic area of a labor dispute is improper despite the fourteenth amendment, why cannot the Washington Court prohibit pickets from trying to induce an unfair labor practice by the employer? The language of the *Ritter* case about "balancing of interests"<sup>81</sup> is just as applicable to this type of employer protection as it is to the protection of neutrals.

Thus ends the contemporary history of the engagement between the Washington Court and the Federal Constitution. It is submitted that Washington could have granted a complete injunction in the *Weyerhaeuser* case without being reversed.<sup>82</sup> The opinion was written, however, before the *Ritter* case, and for that reason we cannot be too critical of the holding. Possibly one is wrong in thinking that the *Ritter* case will be extended beyond remote picketing, but the recognition of one limitation by that opinion on free speech leads one to hope that the Court may be willing to examine purpose in determining the propriety of peaceful picketing.

#### LOOSE ENDS

The reception given to the Supreme Court rulings in picketing cases has not been uniform in the state courts. The Washington cases just discussed exemplify what might be called a "complete acceptance" of the identification between free speech and peaceful picketing. Under this view the necessity of proving justification for harm done is minimized, if not abrogated. When picketing is peaceful,<sup>82a</sup> the right of free speech precludes a consideration of the objective sought by the pickets. If the *means* are proper, the *end* cannot be questioned.

<sup>78</sup> 312 U. S. at 298.

<sup>79</sup> But see discussion, *infra* page 171. The *Ritter* case turned on the *means* employed, not the *end* sought.

<sup>80</sup> It has been held by many federal courts that an employer who deals with a minority union after election but before certification commits an unfair labor practice. *N. L. R. B. v. Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6th, 1939); *N. L. R. B. v. Piqua Munising Wood Products Co.*, 109 F. (2d) 552 (C. C. A. 6th, 1940); *N. L. R. B. v. Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. C. A. 2nd, 1940). Cf. cases cited note 71. Federal courts must ponder the scope of the Norris-La Guardia Act.

<sup>81</sup> See discussion, *supra* page 164.

<sup>82</sup> *Accord: White Co. v. Murphy*, ..... Mass. ...., 38 N. E. (2d) 685 (1942).

<sup>82a</sup> *Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941); *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440 (1941). Notice how bluntly one law review writer expresses his interpretation: "... the Court has clearly enunciated the doctrine that all peaceful picketing, no matter what extenuating circumstances are shown, is merely to inform the public facts of the dispute, and hence is not subject to restraint." Syme, *The Supreme Court and Labor Law* (1941) 13 PENN. B. A. Q. 40, 45.

Other courts have given a much cooler reception to the Supreme Court's ideas. Focusing upon the *Meadowmoor* case,<sup>83</sup> the judges have noted its citation of language from the *Thornhill* decision that

"the power and duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted."<sup>84</sup>

If the object of the picketing is improper according to their own standards, the activity, although peaceful, is enjoined. This interpretation practically ignores the *Swing* case,<sup>85</sup> yet unless that case is exactly in point,<sup>86</sup> the courts continue to issue numerous injunctions.<sup>87</sup>

The *Ritter* case,<sup>88</sup> with its limitation upon remote picketing, suggests a middle position previously taken by some state courts; that is, peaceful picketing normally is to be protected by the constitutional guaranty of free speech, but that right is not absolute, and if abused, an injunction may be warranted. Ritter got his injunction because he was outside the area of the industrial dispute; the state courts, largely by dictum, have suggested other limitations upon freedom of speech.<sup>89</sup>

A fourth group of courts not only holds that the *Swing* case protects all picketing as long as it is peaceful, but also construes that decision to immunize other forms of labor activity from injunctive relief. Kentucky has refused to enjoin a secondary boycott on the authority of the free speech cases<sup>90</sup> and the New Jersey court cited the *Swing* case when

<sup>83</sup> *Supra* note 26.

<sup>84</sup> *Thornhill v. Alabama*, 310 U. S. 88, 105 (1940).

<sup>85</sup> *Supra* note 28. One recent state court opinion cites the *Meadowmoor* case, but does not even mention the *Swing* decision. *Borden Co. v. International Brotherhood of Teamsters*, 152 S. W. (2d) 828 (Tex. Civ. App. 1941).

<sup>86</sup> *Heine's, Inc. v. Truck Drivers' and Helpers' Union*, 129 N. J. Eq. 388, 19 A. (2d) 204 (1941); *Chrisman v. Culinary Workers' Local Union*, ..... Cal. ...., 115 P. (2d) 553 (1941); *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440 (1941); *Feller v. Loral*, 129 N. J. Eq. 42, 19 A. (2d) 784 (1941).

<sup>87</sup> *Miller v. Gallagher*, 28 N. Y. S. (2d) 606 (1941); *Petrucchie v. Hogan*, 27 N. Y. S. (2d) 718 (1941); *Wisconsin Emp. Rel. Bd. v. Milk Drivers' Union*, 238 Wis. 379, 299 N. W. 31 (1941). Cf. Chief Justice Robinson's reluctant acceptance of the inevitable, *supra* note 68.

Notice also the tendency of some courts to issue mild injunctions, such as the limiting of the pickets to five at the main entrance to the Weyerhaeuser plant, when violence is suggested. *Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941); *Ellingsen v. Milk Wagon Drivers' Union* 377 Ill. 76, 35 N. E. (2d) 349 (1941); 2063 Lawrence Ave. Bldg. Corp. v. Van Heck, 377 Ill. 37, 35 N. E. (2d) 373 (1941). The *Meadowmoor* injunction, on the other hand, was blanket. See discussion, *supra* page 159.

<sup>88</sup> *Supra* page 162.

<sup>89</sup> *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440 (1941); *Lora Lee Dress Co. v. International Garment Workers*, 129 N. J. Eq. 368, 19 A. (2d) 659 (1941); *Heine's v. Truck Drivers' Union*, 129 N. J. Eq. 388, 19 A. (2d) 204 (1941); *People v. Muller*, 286 N. Y. 281, 36 N. E. (2d) 206 (1941); *Alliance Auto Service v. Cohen*, 341 Penn. 283, 19 A. (2d) 152 (1941). *White Co. v. Murphy*, ..... Mass. ...., 38 N. E. (2d) 685 (1941) granted an injunction on facts similar to those in the *Weyerhaeuser* case. If this decision is appealed to the United States Supreme Court, a troublesome area in the law of picketing should be clarified. See discussion, *infra* p. 172.

<sup>90</sup> *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440 (1941). See also 2063 Lawrence Ave. Bldg. Co. v. Van Heck, 377 Ill. 37,



it recently denied an injunction against a threatened secondary strike.<sup>91</sup>

In the past, many courts held that unless the pickets and the employer stood in the relationship of employer-employee, the picketing was improper.<sup>92</sup> The direct holding in the *Swing* case settled this controversy, and the state courts have recognized that free speech places such picketing beyond an injunction.<sup>93</sup>

Even before the *Wohl* case,<sup>94</sup> which held unconstitutional an injunction against the picketing of a man doing all his own work, the Washington Court refused to enjoin this form of picketing on the authority of the *Swing* case.<sup>95</sup> When the Supreme Court reversed the granting of an injunction to Wohl, it demonstrated the accuracy of that interpretation.

The legality of picketing third persons, however, is completely up in the air. Although the *Wohl* case says that free speech guarantees the right to picket retailers who buy from a "peddler" of baked goods, the *Ritter* opinion refers to such secondary picketing as justifiable only because it follows the subject matter of the dispute,<sup>96</sup> and proceeds then to hold that picketing must be confined to the economic area of the controversy. Although some figures of speech are framed in terms of the place of the picketing in the *Ritter* case, the thought underlying the decision is the protection of strangers. Wohl's business interest is the same as that of his customers—the distribution of baked goods; Ritter's restaurant has no business connection with a building incidentally being constructed for him by a non-union contractor.

Observe also that in the *Wohl* case an immediate disputant requested the injunction, while in the *Ritter* case it was the third party who sought judicial relief. Will the Supreme Court attach any significance to the nature of the party plaintiff?<sup>97</sup> Will they make the scope of free speech depend upon product-tracing, or upon unity of interest?<sup>98</sup> Will they

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35 N. E. (2d) 373 (1941). The secondary boycott is outside the scope of this paper. See TELLER, *supra* note 8, Chap. 9; Barnard and Graham, *supra* note 11.

<sup>91</sup> Kingston Trap Rock Co. v. Local No. 825, 129 N. J. Eq. 570, 19 A. (2d) 440 (1941). On the secondary strike, see TELLER, *supra* note 8, Chap. 7. See also: *Opera on Tour v. Weber*, 285 N. Y. 348, 34 N. E. (2d) 349 (1941), cert. denied, 62 Sup. Ct. 96 (federal question not decided by lower court). Union officials were enjoined. Does enjoining the officials rather than the members themselves evade the constitutional issue of free speech?

See a good collection of state labor statutes in Smith and DeLancey, *The State Legislatures and Unionism* (1940) 38 MICH. L. REV. 987. Cf. a collection of federal "Anti-Fifth Column" statutes, some of which may affect organized labor, Comment (1941) 41 COL. L. REV. 159.

<sup>92</sup> TELLER, *supra* note 8, §§ 117-8.

<sup>93</sup> *S. & W. Fine Foods, Inc. v. Retail Drivers and Salesmen Union*, 111 Wash. Dec. 168, 118 P. (2d) 962 (1941), and cases cited, *supra* note 86.

<sup>94</sup> *Supra* note 41.

<sup>95</sup> *O'Neil v. Building Service Employees' International Union*, 9 Wn. (2d) 507, 115 P. (2d) 662 (1941). Cf. *Coman v. Osman*, 27 N. Y. S. (2d) 353, which is in accord, but does not go on the basis of free speech. See also: *Feinberg v. Pappas*, 30 N. Y. S. (2d) 5 (1941); *Friedman v. Blumberg*, 342 Penn. 570, 21 A. (2d) 41 (1941) (the picketed-plaintiff occasionally had outside help).

<sup>96</sup> See discussion, *supra* page 162. This appears to be the doctrine of *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937). See Barnard and Graham, *supra* note 11, at 155.

<sup>97</sup> Most state courts make no distinction. See TELLER, *supra* note 8, § 123.

<sup>98</sup> See note 96, *supra*.

strictly confine picketing to the industrial area of the primary dispute?<sup>99</sup> Three recent opinions of state courts, all citing the free speech cases, have refused an injunction at the request of a third person who was in a position to bring pressure upon the immediate disputant and thereby aid the union cause,<sup>100</sup> but only the future decisions of the High Court can accurately answer these questions.

In the *Ritter* case the proprietor of the restaurant could have chosen a union contractor originally, but having contracted with a non-union man, what pressure could he bring without breaching his contract?<sup>101</sup> Without discussing this problem, the New York Court of Appeals has upheld picketing aimed at inducing the plaintiff to break his contract with a non-union supplier.<sup>102</sup> Somewhat analogously, the Washington Court refused to enjoin pickets who were trying to induce Weyerhaeuser to break the law.<sup>103</sup> Since the *Ritter* case turned upon the remoteness of the picketing to the primary dispute, the purpose of the picketing was not considered. Until the Supreme Court finds it necessary to consider this element, another aspect of picketing remains in doubt.<sup>104</sup>

<sup>99</sup> *Carpenters and Joiners Union v. Ritter's Cafe*, 62 Sup. Ct. 807 (1942).

<sup>100</sup> *Alliance Auto Service, Inc., v. Cohen*, 341 Penn. 283, 19 A. (2d) 152 (1941) (picketing of retailer who bought from disputant-wholesaler); *Lora Lee Dress Co. v. International Garment Workers*, 129 N. J. Eq. 368, 19 A. (2d) 659 (picketing of "parent" corporation of independent subsidiary corporate-disputant); *Ellingsen v. Milk Dealers' Union*, 377 Ill. 76, 35 N. E. (2d) 349 (1941) (picketing of retailers purchasing from an "improper" [union-wise] distributional system). It would seem that the *Wohl* case supports the first and last of those cases, but would a parent corporation be "remote" under the rule of the *Ritter* case?

*Contra: Borden Co. v. International Brotherhood of Teamsters*, ..... Tex. ...., 152 S. W. (2d) 828 (1941).

<sup>101</sup> Of course, *Ritter* could have offered to pay the contractor the difference in cost of the building due to union labor. But suppose the contract was let by bid? Does a man have to investigate the bidders, and accept only bids from union contractors in order that he may be relieved of the danger of future picketing, or the duty of paying more money for his building to avoid picketing?

Since the Wagner Act is quasi-criminal, the Court may distinguish between picketing to induce a breach of the law (*Weyerhaeuser* case) and picketing to induce a breach of contract (*Ritter* case). The contract problem is complicated by the additional fact that all labor is at least on a day by day contract. When is the picketing "inducing the breach of a recognized contract?"

<sup>102</sup> *People v. Muller*, 286 N. Y. 281, 36 N. E. (2d) 206 (1941).

<sup>103</sup> *Weyerhaeuser Timber Co. v. Everett Lumber Workers*, 111 Wash. Dec. 377, 119 P. (2d) 643 (1941). *Contra: White v. Murphy*, ..... Mass. ...., 38 N. E. (2d) 685 (1941). See note 101 for explanation of the "analogy."

<sup>104</sup> The question, "Can state courts look at the end sought by the pickets, or only at the nature of the picketing itself?" arises in other fact patterns. Since the *Swing* case, the courts refuse to enjoin picketing for a closed shop. *Lora Lee Dress Co., Inc. v. International Garment Workers*, 129 N. J. Eq. 368, 19 A. (2d) 659 (1941); *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S. W. (2d) 440 (1941); *Haines' v. Truck Drivers' Union*, 129 N. J. Eq. 308, 19 A. (2d) 204 (1941); *Friedman v. Blumberg*, 342 Penn. 570, 21 A. (2d) 41 (1941). Cf. *Weber v. Opera on Tour, Inc.*, 285 N. Y. 384, 34 N. E. (2d) 349 (1941), cert. denied, 62 Sup. Ct. 96 (1941).

What will happen to earlier cases which enjoined picketing because it was for an "unlawful" purpose; e. g.: illegal to picket to coerce settlement of a cause of action for damages, *Jensen v. St. Paul Moving Pictures*, 149 Minn. 58, 259 N. W. 811 (1935); pickets enjoined from seeking to compel an employer to fix minimum prices for his product as prescribed

Reading the *Wohl* and *Ritter* cases together, it would appear that when the Court said in the latter that picketing must be confined to the area of the industrial dispute, it had reference to the intimacy of relationship between the disputant and the person picketed, rather than to the physical locality of the demonstrations. The picketing of the homes of the disputants, therefore, is probably still unsettled, and state courts will continue to be in doubt whether to continue to enjoin such activity. One court argued by analogy from the *Swing* case to justify its refusal of an injunction against pickets placed outside the residence of an employee,<sup>105</sup> but as yet there is a dearth of recent cases. Perhaps the right of privacy, mentioned in the *Thornhill* case<sup>106</sup> as an exception, will be considered strong enough by the Supreme Court to lead that body to hold that state policy can continue to determine this question.<sup>107</sup>

Twenty years ago, the Supreme Court required the granting of the injunction sought in *Truax v. Corrigan*,<sup>108</sup> and in the course of its opinion stated that state libel laws were not sufficient protection for an employer against untruthful placards carried by the pickets. The person picketed has usually been given injunctive relief against grossly misleading placards.<sup>109</sup> Since the introduction of free speech into labor law, in one case involving the problem, the court cryptically said.

"Free speech does not legalize untruth. Nor can the Constitution be invoked as a shield against misrepresentation."<sup>110</sup>

This exception to free speech in picketing cases seems proper.<sup>111</sup>

Until a few months ago, one could have avoided trying to summarize the effect of free speech upon these various fact patterns simply by stating that the language of the *Swing* case was too general, and that it would take another decision of the Supreme Court to determine just

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by the union, *Tunick v. International Association*, 2 C. C. H. Lab. Cas. 302 (1939-lower Calif. Court); unlawful to picket because employer was not conforming to the N. I. R. A., *Driggs Dairy Farms, Inc., v. Milk Drivers' Union*, 49 Ohio App. 303, 197 N. E. 250 (1935); illegal to picket in protest against an employer's refusal to operate all his plant, *Welinsky v. Hillman*, 185 N. Y. S. 257 (1920). See additional problems suggested by TELLER, *supra* note 8, § 114.

<sup>105</sup> Historically, it has been held illegal to picket an employer's place of residence, and usually, the picketing of an employee's home has been held to be enjoinable. TELLER, *supra* note 8, § 115.

<sup>106</sup> *Thornhill v. Alabama*, *supra* note 23.

<sup>107</sup> At this point it should be noted that the federal courts have a free speech problem to settle all by themselves. This entire paper could have been written about what an employer can or cannot say about labor unions in view of the Wagner Act. One famous case has recognized that employers as well as employees have a right to speak freely. *N. L. R. B. v. Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6th, 1940). On this problem see: Killingsworth, *Employer Freedom of Speech and the N. L. R. B.* (1941) 1941 Wis. L. REV. 211; Dusen, *Freedom of Speech and the National Labor Relations Act*, 35 ILL. L. REV. 409; Note (1941) 89 U. OF PA. L. REV. 302.

<sup>108</sup> 257 U. S. 312 (1921).

<sup>109</sup> For example, *Wilner v. Bless*, 243 N. Y. 544, 154 N. E. 598 (1926). See collection of cases, TELLER, *supra* note 8.

<sup>110</sup> *Coward Shoe, Inc., v. Retail Shoe Salesmen's Union*, 31 N. Y. S. (2d) 781, 784 (1941). See also: *Wisconsin Empl. Rel. Bd. v. Milk Drivers' Union*, 238 Wis. 379, 299 N. W. 31 (1941).

<sup>111</sup> Cf. *Near v. Minnesota*, 283 U. S. 697 (1931) where the Court found a violation of free speech in a state injunction against continued publication of libelous materials. But picketing involves something more than just freedom of the press or speech, and therefore the *Near* case is distinguish-

how far free speech could be carried into the field of labor law. March 31, 1942, brought forth that other decision—the *Ritter* case. Although one limitation<sup>112</sup> was placed upon peaceful picketing by that opinion,<sup>113</sup> the decision threw but little light on the multitude of other situations just considered. The Court recognized that state policy may be of importance in the determination of the legality of some forms of picketing, but it is still impossible to prophesy accurately whether a state court can issue an injunction in Case X without being reversed.<sup>114</sup> The difficulty of arguing from the specific to the general to another specific has been adverted to previously;<sup>115</sup> this writer has been able to do little more than pose the problems and to express his personal views as to their proper solution. Courts should neither dogmatically permit all peaceful picketing nor arbitrarily censure it “illegal *per se*.” The facts of each case should be analyzed, and the injury to the employer, the purposes of the union, the availability of other means, and the general interest of society should be considered. Perhaps the Supreme Court will establish some standards to guide this approach. If such is done, the outcome might well be a happy one.

#### ONE THOUGHT IN CONCLUSION

To conclude is to speak generally, or to repeat. This writer prefers the former but recognizes that the decided cases are too few to provide any satisfactory basis for generalizations. Perhaps, then, it is proper to go far afield, and to close with this thought:

The federal system presupposes a balancing of powers between the national and state governments. By finding a federal question in picketing cases, the Supreme Court has extended its power of judicial review, and has developed a doctrine with which it can proceed constructively to unify the treatment given labor in all the courts of the country. The protection of civil rights against state invasion is the constitutional basis of the free speech doctrine, and a discussion of the conflict between the reserved powers of the states and the delegated power of the nation is therefore unnecessary and improper. Since “freedom of speech” under the fourteenth amendment is a restriction on state action toward individuals, it would be hard to conceive of a constitutional power in Congress to legislate affirmatively on the subject of what can and what cannot be enjoined by state courts.<sup>116</sup> The Supreme Court, however, by its “negative” influence<sup>117</sup> can go a long way toward legislating nationally under the guise of protecting civil rights. The fear of reversal may be just as effective as an Act of Congress.<sup>118</sup> The answer to future picketing problems may well depend upon how strictly the Supreme Court wants to “legislate” in this field.

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able. See discussion, *supra* page 160.

<sup>112</sup> Of course, the requirement of absence of violence is another limitation. *Milk Wagon Drivers' Union v. Meadowmoor Dairy*, 312 U. S. 287 (1941).

<sup>113</sup> That is, the free speech protection only extends to picketing within the area of the industrial dispute.

<sup>114</sup> For example, see *Hotel and Restaurant Employees' Int. Alliance v. Wisc. Emp. Rel. Bd.*, 62 Sup. Ct. 706 (1942).

<sup>115</sup> *Supra* page 157.

<sup>116</sup> Seemingly, a matter purely intra-state.

<sup>117</sup> *Supra* page 156.

<sup>118</sup> For example, Chief Justice Robinson's attitude, *supra* page 167.